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POLITICAL PRACTICES



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Sandy Welch
PO Box 1596
Helena, MT 59624

COPP-2014-AO-004

Re: A Particular Definition of Contribution

Dear Ms. Welch:

I write in response to your inquiry of January 8, 2014 regarding certain reporting and disclosure issues, including use of "firewalls" to allow certain campaign relationships without creating coordination. As we later discussed, this request also triggers a review of a certain definition of contribution.

I further explained that a response to this question needed to be made in the form of an advisory opinion as that gave some precedential value to the response. More importantly, it meant that the response will be made available to the public and subject to public review and application. I further explained that this Office would invoke the pre-issuance public comment step authorized by administrative rule [44.10.201(1)(b) ARM] in regard to Advisory Opinions. You agreed with this approach.

NOTICE OF PUBLIC HEARING

Accordingly, this document constitutes a draft advisory opinion to be used to solicit public comment, including a public hearing. Citations to authority are not included in this document. Citations will be added after the hearing before issuing a final advisory opinion. The public hearing will take place at the office of the Commissioner of Political Practices on Tuesday, March 4, 2014 at 10:00 A.M. located at 1219 8th Avenue, Helena, MT. You are receiving this draft opinion because it is believed you or your organization may be interested in the position taken in this advisory opinion. Please RSVP by contacting Vanessa Sanddal (444-4270). The

hearing location will change (and Ms. Sanddal will provide notice of the change) if the number of people reserving attendance is more than the Commissioner's conference room can accommodate. The public hearing will be informal, with all comments accepted and encouraged. The panel of involved public employees who will listen to comments and incorporate those comments into the development of the final advisory opinion are Jonathan Motl, Jaime MacNaughton, James Scheier and Mary Baker. The hearing will last as long as necessary to hear and understand the public comments.

The above introduction aside, the specific question you posed for advisory opinion consideration is as follows:

Given the recent determinations regarding coordination I am requesting an advisory opinion regarding organizations such as party committees or political committees that work to support their candidates of choice. Specifically there are a few organizations of which I am aware that raise money, train candidates and provide ongoing support and advice, and mail pieces or make other expenditures in support or opposition. These organizations set up "firewalls" inside the organization to prevent coordination either by having different staff members, contractors or subcommittees work with candidates and another make expenditures. Is this enough to avoid coordination? What would the firewall have to look like? What documentation of activities would be required to demonstrate the independence between these arms?

DRAFT ADVISORY OPINION

OFFERED FOR THE PURPOSE OF PUBLIC COMMENT, SEE ABOVE

The series of questions posed first requires a review of, with following delineation, the definition of "contribution" under Title 13. After that review the questions will each be addressed.

I. This Advisory Opinion is Prospective

This advisory opinion, if adopted, specifically and directly vacates, changes and replaces the contribution related authority set out in the Decision entitled *Deschamps v. Bullock*, COPP-2012-CFP-12 (May 15, 2012, Deputy Commissioner Dufrechou). Because of the legitimate statutory construction

confusion described below, this advisory opinion, if adopted, will not reopen or affect the outcome of *Deschamps v. Bullock*, nor will it apply to effect other comparable instances in other past campaigns. Stated another way, if adopted (and as may be modified following public comment) the advisory opinion will not be retroactive, but will be prospective from the date of the date of adoption of the advisory opinion. The advisory opinion will, upon adoption, define the manner in which the Commissioner will enforce applicable portions of the Montana Campaign Practice Act during the 2014 campaign cycle.

II. Contribution Includes Paid Staff of Political Committees

As a foundational matter, it is the opinion of the Commissioner that value of paid personal services provided to a candidate's campaign and paid for by a political committee is a contribution under Montana law that is subject to reporting, disclosure and contribution limitation. The following is the formal advisory opinion:

Title 13 of the Montana Code Annotated requires that the value of any personal services rendered by an individual paid by a political committee, including a party committee, to a campaign, including a candidate campaign, constitutes an in-kind contribution to the campaign subject to applicable reporting, disclosure and limits. However, a political committee's provision of or payment for personal services providing internal legal and accounting payments to a political committee or candidate committee for non-election purposes is not such an in-kind contribution.

The above advisory opinion applies to that portion of the Title 13 contribution definition set out at §13-1-101(7)(a)(iii) MCA: "contribution" means "the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee."

In *Deschamps v. Bullock*, Deputy Commissioner Dufrechou applied Montana's basic rules of statutory construction to §13-1-101(7)(a)(iii) MCA. Deputy Commissioner Dufrechou construed the statutory language to declare that amounts paid for staff placed into a candidate campaign by another political committee were not a contribution.

Deputy Commissioner Dufrechou's *Deschamps v. Bullock* analysis is lacking in two ways. First, in terms of statutory construction the analysis failed to utilize the entirety of §1-2-101 MCA, the relevant statute defining construction. That statute ends with the direction that "[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Deputy Commissioner Dufrechou's approach to construction focuses on one particular (one sentence within §13-1-101(7)(a)(iii) MCA) and ignores conflicting contribution language in other sentences set out in Title 13. Those conflicting sentences include the overall definition of contribution ("anything of value") and the definition of volunteer services. A statutory construction giving effect to all provisions supports the advisory opinion position set out above.

Deputy Commissioner Dufrechou's interpretation also does not attempt to reconcile and create consistency in this Office's previous positions on this issue. Deputy Commissioner Dufrechou's hesitancy to address this issue is understandable. The *Deschamps v. Bullock* Decision frankly states that "[i]t is difficult if not impossible to reconcile some of the various past positions with the statutory language, but none of the past positions taken by the COPP are binding on determination of the present issue." Deputy Commissioner Dufrechou's Decision may have been prudent, but it did not eliminate the need to reconcile the "various past positions." When those positions are reconciled, as this advisory opinion does, the Commissioner is lead to the contrary advisory opinion set out above.

The Commissioner's office has a 20 year history of interpreting §13-1-101(7)(a)(iii) to require reporting and disclosure of the election use value of paid staff by any entity involved in a ballot issue campaign. The Commissioner will add appropriate citations to the final advisory opinion. For the purposes of this draft opinion the Commissioner represents that multiple past Decisions have held organizations from the Chamber of Commerce to MontPIRG in violation of campaign practice law for failing to fully report paid staff costs relative to the ballot issue campaigns. These Decisions fall within the reach of, and contradict, the *Deschamps v. Bullock* Decision as paid staff value was reported as made by a political committee (an incidental ballot committee) to a campaign (the principal ballot committee).

There is only one Title 13. The definitions in Title 13 apply to ballot committees, political committees and candidates alike. This Commissioner recognizes that in Montana ballot related committees have traditionally led

candidate committees when it comes to defining and refining the application of Title 13. That difference in practical approach, while having no basis in law, may explain why at the same time ballot committees and incidental committees involved in ballot issues were being rigorously investigated and regulated for in-kind staff costs, candidate committees were treated differently. This Commissioner has reviewed several letters spanning a decade (the ones apparently reviewed by Deputy Commissioner Dufrechou) between this Office and representatives of political committees or candidates wherein in-kind staff costs were not treated as contributions. The *Deschamps v. Bullock* Decision is based on that approach. That said, the exclusion of in-kind staff costs to candidate committees was taken through non-public internal letters that were not published as advisory opinions or as Decisions. Without that public review (establishing precedent) those letters lacked any authority of precedent. The precedent for in-kind valuation of paid staff resources was set in the ballot issue Decisions. Those Decisions conflict with *Deschamps v. Bullock*.

The interpretation of the definition of contribution under §13-1-101(7)(a)(iii) is also guided by the approach taken by the Federal Election Commission (FEC). Much of Montana's Title 13 statutory language, including §13-1-101(7)(a)(iii), was borrowed from the comparable federal law. The FEC, faced with the same issue raised in *Deschamps v. Bullock*, interpreted the contribution language to mean that contribution included all paid personal services except for the internal, non-electioneering legal and accounting services provided to the political or candidate committee. With that interpretation the FEC gave effect to the remaining portions of federal law defining contribution. Later federal law was amended to change the language that Montana still retains. Montana, however, can look to the federal interpretation as guidance.

The Commissioner notes that this is a significant campaign practice determination. The in-kind staff loophole allowed to political committees (first made into precedent by *Deschamps v. Bullock*), has been informal with knowledge confined to the political parties and a few select political committees. Certainly, a generic in-kind loophole was unknown to the large and involved ballot issue community, all of whom followed the formal Decision based interpretation requiring reporting and disclosure of in-kind staff electioneering costs in ballot issue activity. But *Deschamps v. Bullock* is not informal it is precedent, and one that conflicts with prior Decisions. The reach of *Deschamps v. Bullock*, were it to prevail as precedent, is significant. Under *Deschamps v. Bullock*, for example, it would be possible for a large corporation

to set up a PAC, fund the PAC and have the PAC hire and place full-time paid staff into every candidate campaign in Montana. All of that in-kind staff cost would not be considered a contribution or subjected to contribution limits under the *Deschamps v. Bullock* Decision. In effect, the Decision allows multiple wide scale political campaigns with each such campaign built around the politics of whatever entity is willing to fund the PAC. That sort of special interest politics is inconsistent with Montana's history of how it expects campaigns to be funded, run, disclosed, and reported. That sort of special interest politics has the potential to interfere with the role and place of political parties, as defined by Montana statute. This Commissioner intends, by the advisory opinion set out above, to revoke and reverse that portion of the *Deschamps v. Bullock* Decision.

III. The Advisory Opinion as applied to Ms. Welch

Upon adoption, the above advisory opinion will apply to Ms. Welch's activities in the following manner. In applying the advisory opinion the Commissioner notes that the date of application will be the date of signature of the final advisory opinion. The Commissioner further notes that the advisory opinion will apply to all political committees, candidates and individuals.

A. Can a PAC Pay for In-Kind Paid Personal Services to a Candidate?

Yes, a political committee can contribute to a candidate's campaign by providing paid personal services. Ms. Welch states that she will be engaged as a paid consultant to Montana Business Advocates for Sensible Elections (Montana BASE), a political action committee. Ms. Welch represents that she may provide paid personal services to a candidate with Montana BASE paying Ms. Welch for some of that work. Ms. Welch's work, on behalf of the candidate, must be reported by Montana BASE as an in-kind contribution to the candidate at the amount Ms. Welch is paid by Montana BASE for that work. The candidate, in turn, must report the receipt of that in-kind contribution.

Montana BASE is a political committee and is subject to reporting, disclosure, and contribution limits. Contribution limits are aggregate, with valuation including cash and in-kind. Any paid personal services provided by Montana BASE specifically to the candidate (including training, advice or other services) must be valued and reported as an in-kind contribution and added to any cash contribution made by Montana BASE to the candidate. Montana BASE's contribution (and therefore its payment to Ms. Welch for work with a candidate) cannot exceed the candidate contribution limit afforded a political committee.

The candidate must likewise report and disclose the Montana BASE contribution amount. A candidate cannot accept a contribution in excess of limits. Because Montana BASE is a PAC the amount contributed also counts toward the aggregate PAC limit.

B. Can Ms. Welch Also Be Hired by the Candidate?

Yes, Ms. Welch can be hired and paid by a candidate's campaign, even though she is also paid to work on the candidate's campaign by Montana BASE. A political committee, subject to contribution limits, may make its contribution in the form of cash or in-kind services.

Ms. Welch specifies that she has established a consulting business that may be hired by party committees, political committees and/or candidate committees. While it is not set forth in Ms. Welch's statement of facts, the Commissioner is aware that the candidates and campaigns Ms. Welch intends to work on are those involving Montana legislative districts. At this time most Montana legislative campaigns do not involve full-time paid staff. It makes sense, and is consistent with Montana's culture of citizen campaigning, that Ms. Welch's business would have multiple candidate clients, given the limited resources that each candidate is likely to have to pay for her services.

There are limits on what a political committee can contribute to a candidate, thereby limiting how much staff time a political committee can hire from Ms. Welch and provide to a candidate. There is no limit on the amount of money that a candidate's campaign can pay to Ms. Welch and therefore no limit on the amount of paid time that Ms. Welch can spend on a candidate campaign, when that time is paid by the candidate.

C. Can Ms. Welch Volunteer her Time to a Candidate?

Yes, Ms. Welch may volunteer her time to a candidate. There are only 24 hours in a day and Ms. Welch has the same 24 hours as any other human being. Ms. Welch is in business and will likely sell most of her time to clients. However, Ms. Welch may choose to allocate her remaining unpaid time, just as any other person may. This volunteer time issue has been decided in regard to ballot issue campaigns.

D. Can Montana Base Engage in Independent Expenditures?

Yes, under Montana law Montana BASE can engage in independent expenditures supporting or opposing a candidate. The fact of Montana BASE's accompanying contribution (whether cash or in-kind) to a candidate does not by itself limit Montana BASE's ability to make independent expenditures

relative to that candidate's campaign. An independent expenditure must be timely reported and disclosed, but is not subject to limits. Please see the coordination discussion, below.

E. Firewalls and Coordination, Should Coordination be a Concern?

Yes, coordination should be cause for concern. Campaigns involve opposing candidates and opposing political camps. Ms. Welch represents that Montana BASE plans to make contributions and engage in independent expenditures. Complaints over campaign practices are common and Montana BASE would be wise to carefully consider its actions in that coordination, if it exists, will turn an independent expenditure into an in-kind contribution. Because Montana BASE is subject to contribution limits it is likely that any such conversion will result in a contribution in excess of limits. An excess contribution is an illegal contribution and creates major problems for the candidate and Montana BASE.

Ms. Welch asked about firewalls. It would be prudent for Montana BASE to erect such a firewall in regard to Ms. Welch. Specifically, a field contractor like Ms. Welch who may be working for the candidate and the PAC should not be involved in any aspect of the independent expenditure activity, including the planning of that activity. Please review the several recent Decisions on coordination. A circumstance of defined, but firewalled shared paid personal services from the same person (Ms. Welch) and the circumstance of actions taken in the same time period (a necessity in that elections are date certain) does not by itself create coordination. So long as there is genuine separation between the candidate and Montana BASE's independent expenditure activity then coordination will not lie.

It is noted that the Commissioner has issued a string of recent Decisions finding sufficient facts to show coordination. The fact of multiple sufficiency findings does not mean that coordination has somehow been made easier to find. To the contrary, the recent Decisions are based on extensive and blatant intermingling of the third party (corporate) and candidate identity. The fact that Montana BASE is considering and asking about Firewalls demonstrates a respect for law that is lacking in the campaigns addressed by recent Decisions. A candidate or third party wishing to avoid coordination can do so. In fact, coordination is the result of an opposite action as it is created by deliberate steps constituting a shared act between the candidate and the third party.

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

The advisory opinion will take effect upon the addition of the Commissioner's signature below. The advisory opinion is now in draft form. The Commissioner's signature will be added following consideration of issues raised at the March 4, 2014 public hearing.

Sincerely,

Jonathan R. Motl
Commissioner of Political Practices